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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/922,824	08/06/2001	Joseph M. Vandepopuliere	5540-IACXCT2	9146

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EXAMINER

WEIER, ANTHONY J

ART UNIT	PAPER NUMBER
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1761

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DATE MAILED: 05/17/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/922,824

Applicant(s)

VANDEPOPULIERE ET AL.

Examiner

Anthony Weier

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 24-30 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 24-30 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_ 6) ☐ Other:

1. Claims 24-30 are rejected under 35 U.S.C. 102(e) as being anticipated by Cox et al (U.S. Patent No. 5431939).

The claims stand rejected for the reasons set forth in the last Office Action (Paper No. 4, mailed 11/23/01).

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 24-30 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of U.S. Patent No. 6303176. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims encompass shell eggs of U.S. Patent No. 6303176 including those being Salmonella negative as set forth therein. It would have been obvious to have practiced the invention of U.S. Patent No. 6303176

beyond the specific group of eggs which are Salmonella negative as defined, since the limitation regarding the overall Salmonella reduction alone (e.g. "5D reduction") would provide an egg having beneficial qualities (e.g. extended shelf life).

3. Applicant's arguments filed 3/5/02 have been fully considered but they are not persuasive.

Applicants argue that Cox et al does not disclose an egg having the reductions in SE which can be assured to be salmonella negative without using processing thermal treatments at or above the Expected Salmonella line of Figure 1. First it should be noted that the instant claims do not specifically set forth that the eggs are salmonella negative and said certain process conditions with regard to Figure 1. Nevertheless, though it may be true that Cox et al and Applicants approached the problem of creating an egg which has a certain Salmonella kill and retained quality in different ways, it is the Examiner's position that the product egg of Cox et al on the instant product claims. It has not been demonstrated that the product of Cox et al differs from that of the instant invention as presently claimed. The product of Cox et al describes same as being "similar to that of a freshly laid egg " (col. 16, lines 24 and 25) with "no significant differences...detected" when tested for raw appearance, taste, and function. Certainly, this falls within the instant claim limitation that said egg possesses no more than "insignificant coagulation." The temperature and time treatment used in Cox et al (internal temperature of 54.4 C for 45 minutes) is at least enough to accomplish what Applicant's were able to accomplish regarding the extent of Salmonella kill called for in the instant claims (see Table 2, page 16 and page 17, first paragraph). And it must be

noted again that this treatment provided an egg which exhibited no significant differences in appearance, taste, and function. Any coagulation that may have occurred would be insignificant under such circumstances. It is requested that Applicants provide a showing to demonstrate that there are any differences between the egg product of Cox et al and that of the instant invention as presently claimed.

Applicants argue that Van Lith, Hou, and Stadelman each teach away from the treatment used in Cox et al as well as that called for in the instant claims. However, it should be noted that Cox et al teaches the particular time and temperature values as well as the avoidance of coagulation (e.g. no occlusion of the egg white) as called for in the instant claims. Hou does set forth that prior art treatment in a water bath at 57 C for greater than 30 minutes "often resulted in denatured egg white proteins". However, this does not mean that the egg white has denatured in every case (but only "often"); moreover, this does not provide any information as to what point actual coagulation of the egg white occurs. Although Van Lith et al indicates that egg white coagulation is effected when heating at the combination of above 57 C and 20 minutes, it does not set forth at what point above 57 C and 20 minutes this actually occurs (e.g. 58 C and 24 minutes?). Stadelman, in the citation of Van Lith et al, slightly revises Van Lith et al's conclusion by stating that extended treatment at 57 C will cause coagulation of egg white proteins (Van Lith et al refers to the combination of time and temperature [at some point] above 57C and 20 minutes as resulting in egg white coagulation). Nevertheless, it still remains that the Cox et al treatment does not result in coagulation under temperatures called for in the instant claims (e.g. no occlusion/egg white clear)..

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Applicants argue that Cox et al did not appreciate the effects achieved by the treatment of eggs in the manner used by Applicants to provide the instant egg product and that (citing from Ebel Process Co. V. Minnesota & Ontario Paper Co., 261 U.S. 45, 66) "accidental results not intended and not appreciated do not constitute anticipation." Whether or not Cox et al was aware of the product produced, the egg product of Cox et al falls within the claim limitations as set forth, absent a showing to the contrary. The recitation of a newly discovered function or property (or in the instant case, perhaps, degree of pasteurization-effected) inherently possessed by the prior art does not cause a claim drawn to such new function or property to distinguish over the prior art. Where the Patent Office has reason to believe that limitations asserted to be critical for establishing novelty may, in fact, be inherent characteristics of the prior art, it possesses authority to require applicant to prove that the product of the prior art does not possess such characteristic relied on. In re Swinehart et al, 169 USPQ 226.

Applicants argue further that they believe that the omission of Figure 10 in a continuation-in-part application of Cox et al is evidence that Cox et al did not believe that thermal treatments would be effective to pasteurize shell egg without coagulation. There is no evidence provided that this is the reason for the removal of Figure 10; perhaps another unforeseen reason exists for same. Nevertheless, for whatever reason Figure 10 did not appear in a follow-up application, the product set forth in Cox et al applied herein still reads on the instant invention as presently claimed.

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 703-308-3846. The examiner can normally be reached on Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are 703-305-3602 for regular communications and 703-305-3602 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Anthony Weier  
May 16, 2002

**ANTHONY J. WEIER**  
**PRIMARY EXAMINER**



5/16/02